86-1060

No. 86-1060

In The

Supreme Court of the United States

OCTOBER TERM, 1987

HEIMBACH, et al.,

Petitioners,

vs.

VILLAGE OF LYONS, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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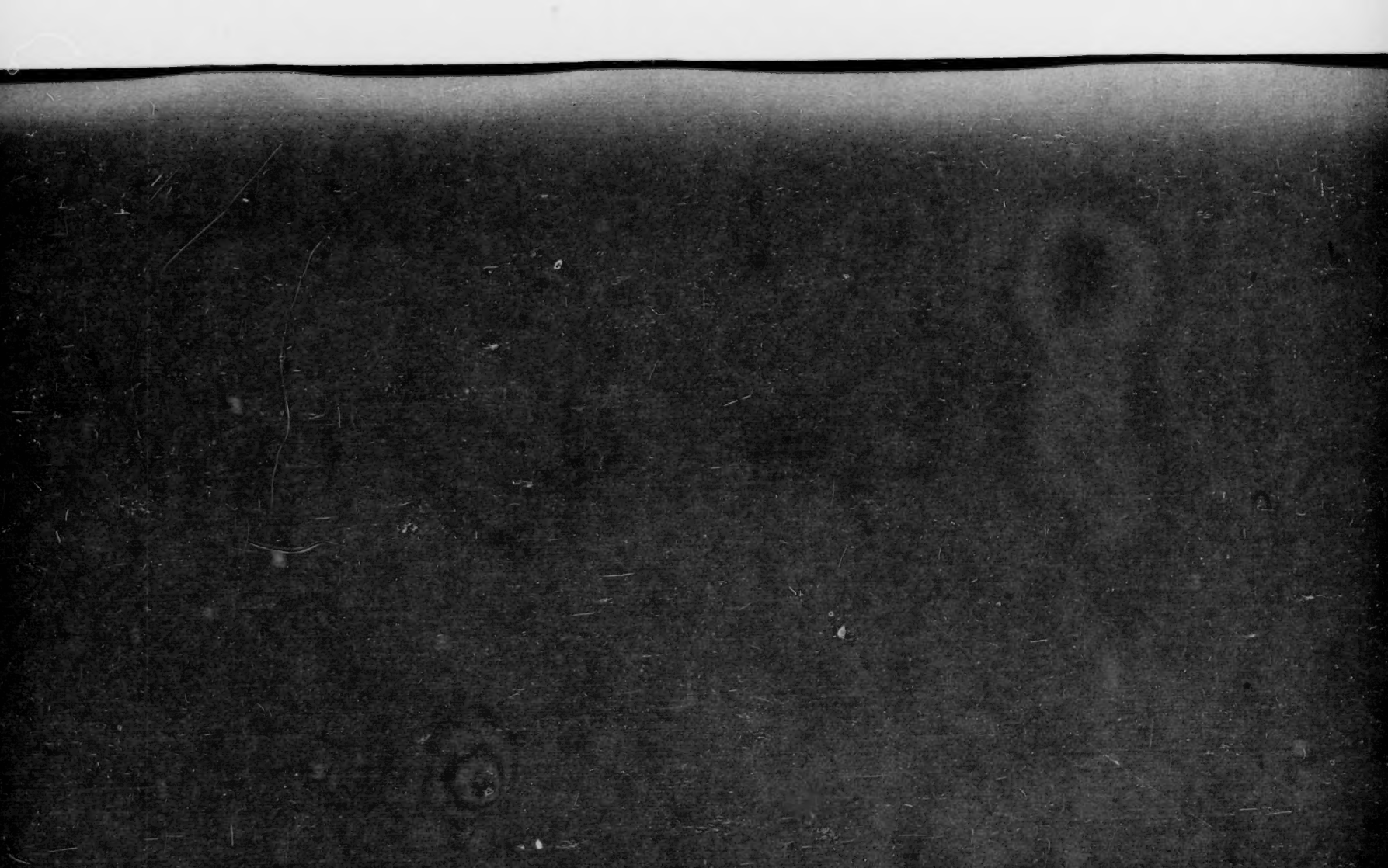

QUESTIONS PRESENTED

I. WOULD A REVIEW BY THIS COURT CONSTITUTE NOTHING MORE THAN A THIRD JUDICIAL EXAMINATION OF THE FACTS OF THIS CASE WHERE THE FINDINGS OF THE COURTS BELOW ARE FAIR AND SUPPORTED BY SUBSTANTIAL EVIDENCE?

II. SHOULD THIS COURT DECLINE TO GRANT A PETITION IN WHICH NO FEDERAL QUESTION OF IMPORTANCE TO THE PUBLIC WAS RAISED BY PETITIONERS?

III. DOES THE SECOND CIRCUIT COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S OPINION REPRESENT A CONFLICT OF AUTHORITY WITH OTHER COURTS OF APPEAL REQUIRING SETTLEMENT BY THIS COURT?

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STATEMENT OF JURISDICTION

Respondents concur with petitioners' Statement of Jurisdiction, but note that respondents were granted one extension of time in which to file their brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Village of Lyons, population 4,500, is located in mid-state New York and is of historical significance as one of the communities that developed when the old Erie Barge Canal was built. The respondents,[1] consisting of the Village of Lyons and various named officials of the Village, successfully sought to have some of the original buildings which were built next to the canal registered in the National Register of Historic Places. However, all of these buildings were in very poor condition and therefore respondents applied for federal assistance to upgrade these buildings, along with other sites in the Village. Respondents hired an architectural firm to perform an evaluation of the historic buildings, which disclosed numerous violations of State and local building codes. In an attempt to rectify this situation, respondents issued notices to remedy these violations to the owners of these buildings, many of whom chose to evict their tenants rather than bring

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[1] Respondents consist of VILLAGE OF LYONS (WAYNE COUNTY, NEW YORK); RICHARD R. EVANGELIST, MARY C. BOYCE, PETER STIRPE and JOHN W. MC CRANELS, individually and as members of the Village Board of the defendant VILLAGE OF LYONS; JOHN DASHNEY, individually and as Mayor of the defendant VILLAGE OF LYONS; LOUIS A. SALERNO, individually and as Building Inspector of the defendant VILLAGE OF LYONS; JOHN LESE, individually and as Chief of Police of the defendant VILLAGE OF LYONS; JAMES J. FABINO, individually and as former Mayor of the defendant VILLAGE OF LYONS; JOHN PERRY, individually and as JUSTICE COURT JUDGE of the defendant, VILLAGE OF LYONS; JOHN DASHNEY, individually and as former Police Commissioner of the defendant VILLAGE OF LYONS; RICHARD R. EVANGELIST, individually and as Police Commissioner of the defendant VILLAGE OF LYONS; and JOHN DOE, RICHARD DOE and JAMES DOE, being one or more police officers of the defendant VILLAGE OF LYONS whose real names are presently unknown.

the buildings into compliance. Petitioners[2] interpreted these and other actions by respondents as a conspiracy to discriminate against petitioners and deprive them of constitutional rights. This general factual description provides a setting for the following discussion of the legal disposition of this case. However, respondents set forth the relevant detailed facts after the legal disposition in rebuttal to some of petitioners' inaccurate factual assertions.

Petitioners commenced this action in the United States District Court for the Western District of New York on October 19, 1977, seeking redress under 42 U.S.C. §§ 1983 and 1985 for alleged constitutional violations committed by respondents. Petitioners alleged that respondents, acting in conspiracy under color of State law, practiced discrimination in attempting to bring the buildings into compliance, and prevented petitioners from exercising their First Amendment rights to freedom of speech, to petition the government for the redress of grievances, and to peaceful assembly.

The late District Court Judge Harold P. Burke granted respondent's Fed. R. Civ. P. 12(b) motion and dismissed petitioners' complaint in 1978 prior to the completion of any discovery, on the grounds that respondent, Village of Lyons, was not a person within the meaning of 42 U.S.C. § 1983, in reliance on the then binding precedent of *Monroe v. Pape,* 365 U.S. 167 (1961). On appeal, the Second Circuit Court of Appeals reversed and remanded on the authority of *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978), which was decided subsequent to the ruling of Judge Burke. The Court of Appeals remanded this

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[2] Petitioners consist of MARK HEIMBACH, individually and as Acting President of CITIZENS COMMITTEE TO SAVE WATER STREET and LEON STOUT, ELAINE STOUT, LENORA SMITH, MARGARET MAHAR, and CAROLYN MORRIS, individually and as members of CITIZENS COMMITTEE TO SAVE WATER STREET.

case "for further proceedings so that the plaintiffs below may be given an opportunity to prove their allegations", *Heimbach v. Village of Lyons,* 597 F.2d 344, 348 (2d Cir. 1979) (A-6).[3]

After more than seven years of discovery, District Court Judge Michael A. Telesca set this action down for trial for February 4, 1986. In that scheduling order, Judge Telesca directed that all motions were to be made returnable no later than January 1, 1986. Respondents timely filed and served their motion for summary judgment, originally returnable December 31, 1985. Petitioners twice requested and received additional time to submit their answering papers. The motion was rescheduled for January 22, 1986. Petitioners did not file and serve their answering papers and cross-motion for summary judgment until one day before the return date, which was five days after the filing deadline. Significantly, the only affidavit in opposition submitted by petitioners was that of counsel. Substantively, petitioners argued that a question of fact existed, essentially on the basis that strong circumstantial evidence supported their allegations and that resolution of the issues presented ultimately hinged on the credibility of witnesses.

In spite of petitioners' failure to properly or timely file their papers, the District Court reviewed the entire record, including petitioners' papers, and correctly granted summary judgment in favor of respondents. In a comprehensive opinion, the District Court addressed each of petitioners' claims individually and found petitioners had failed to demonstrate any genuine issue of material fact. The District Court dismissed without prejudice petitioner Mark Heimbach's claim that his due process rights were violated when he was arrested, but stated that "at this point, I can see no constitutional violation in plaintiff Heimbach's arrest." (A-21).

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[3] Appendix at page ____ hereinafter referred to as (A-).

Petitioners then appealed to the Second Circuit Court of Appeals, arguing that the District Court did not view the facts in the light most favorable to petitioners, that it improperly excluded evidence from its consideration, that it misapprehended the facts of the case, and that it misapplied the law. The lengthy and factually complex record was reviewed by the Court of Appeals. Chief Judge Ellsworth A. Van Graafeiland, Judge Thomas J. Meskill, and Judge Jon O. Newman affirmed the judgment of the District Court for the reasons set forth in Judge Telesca's opinion (A-23).

Petitioners now petition this Court for a writ of certiorari on the grounds that the Court of Appeals committed reversible error in affirming the District Court and that the order by the Court of Appeals represents a conflict with other Courts of Appeals which requires this Court's review. It is respondents' position that petitioners are essentially requesting that this Court review the specific facts of this case, which have already been given full consideration by two previous courts. Respondents urge that certiorari be denied on the grounds that the decisions of the District Court and Court of Appeals were correct and fair, that petitioners have not presented an important federal question for this Court to pass on and that no conflict of decisions between the Circuits exist with respect to this case.

The relevant facts follow. In 1976 and 1977 respondents submitted applications through the Wayne County Planning Board for federal assistance under the Community Development Block Grant (hereinafter referred to as "CDBG") program (CA-123).[4] Public hearings were held prior to the submission of these applications, as required by law (CA-123, 124). In conjunction with

[4] The factual references designated as (CA-) refer to the exhibits which were filed with respondents' motion for summary judgment in the District Court and which were then sent to the Second Circuit Court of Appeals as part of the Record on Appeal. These exhibits were too voluminous to be attached hereto as part of the Appendix.

these applications, the respondent Village of Lyons Board of Trustees (hereinafter refereed to as the "Board") hired the architectural firm of Sherman and Sherman to study and evaluate the historic buildings located in the Water and Broad Street area in the Village (CA-124). Respondent Louis A. Salerno, the Village Building Inspector, accompanied the Sherman and Sherman architect who inspected the buildings and he took notes of State and local building code violations (CA-129). On May 24, 1977, the Village held a public information meeting. At this meeting, Sherman and Sherman presented and explained its report to the Board and the Water and Broad Street area landlords (CA-124, 129, 130).

On July 6, 1977, Mr. Salerno issued notices to remedy violations to landlords of buildings which were out of compliance (CA-130). There is no dispute that these buildings contained many code violations (R-60, Exhibit "L").[5] These notices were based upon Mr. Salerno's inspection of the buildings and the Sherman and Sherman report (R-60, Exhibit "D"). One of the landlords served with a notice was Travis Spencer, the owner of the property at 40 Water Street (CA-130). The property consisted of three rental units: one on the third floor, one on the second floor, and a storefront on the ground floor (CA-130). At the time the notice was served on Mr. Spencer, only the unit on the second floor was occupied (CA-130). Mr. Spencer agreed not to rent the storefront and third floor unit until he brought the building into compliance with the State Building Construction Code (R-69 at pp. 18-20).

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[5] The factual references designated as (R-) refer to the documents listed in the Index to the Record on Appeal. Since petitioners did not confer with respondents in compiling the Joint Appendix in the Court of Appeals, respondents refer to the Index to the Record on Appeal for identity of the documents cited for factual verification.

During the summer of 1977, petitioner Heimbach and others formed the Citizens Committee to Save Water Street (hereinafter referred to as "CCSWS") to protest the Village's enforcement of the State and local building codes and the Village's alleged misuse of State and federal redevelopment funds. Members of the groups voiced their concerns at public Board meetings in the summer and fall of 1977 (R-45 at p. 10). On August 16, 1977, members of the Eastern Farmworkers Association (hereinafter referred to as "EFWA"), and petitioners Heimbach and CCSWS, began picketing outside the Board meetings and the County of Wayne Department of Social Services in the Village to protest the building code enforcement program (CA-62). Petitioner Heimbach was also associated with the EFWA. The groups picketed all Board meetings, which were held every two weeks, until the middle of November 1977. The groups picketed outside the Department of Social Services every weekday until January or February of 1978 (CA-72-73). They demonstrated with signs, verbal communications, and handed out leaflets throughout these demonstrations (CA-75). During the course of these demonstrations, respondents made absolutely no attempts to either stop or inhibit the demonstrators from exercising their First Amendment rights (CA-134).

On August 17, 1977, Mr. Salerno inspected the premises at 18 Geneva Street at the request of the owner, Mr. Valcho Pikoff. The EFWA was renting the premises at that time and after the inspection, Mr. Pikoff informed the members of the EFWA that they would have to vacate. At the time of his inspection, Mr. Salerno was unaware that the EFWA or anyone else was renting the building. Mr. Salerno inspected the premises because Mr. Pikoff had recently completed repairs and Mr. Pikoff wanted to see if they met code standards (R-69 at pp. 58-60).

Petitioner Heimbach voiced the concerns of the EFWA and CCSWS at at least two private meetings with respondents Mayor

Fabino and the Board of trustees (R-45 at pp. 30, 31, 41-43, 48-50). Mayor Fabino wrote a letter to the Department of Housing and Urban Development, dated September 2, 1977, advising of the Village's concern about the relocation of residents in the affected area (CA-154). Petitioner Heimbach and other members of the two groups demanded that an advisory committee, composed of EFWA and CCSWS members, be established by the Board. Respondents established such a committee. The groups then demanded that the committee be given decision-making power, that is, the right to vote at Board meetings. By letter dated September 12, 1977, Mr. Villani, the Village attorney, advised that the Board was "free to utilize the citizens committee as an advisory group and request and/or rely upon it for such advice as it sees fit", but that the citizens committee could not have any actual decision-making power for the Village (CA-125-127).

On September 12, 1977, Petitioner Heimbach and the EFWA moved into the premises owned by Mr. Spencer at 40 Water Street (CA-83). The EFWA had entered into a lease with Mr. Spencer and the lease term was to begin October 1, 1977, although the building had not been brought into compliance with the State code. Several serious violations of the State Building Construction Code, including inadequate fire separations, remained uncorrected. Mr. Heimbach and the EFWA moved into the building without Mr. Spencer's permission (CA-130, 131).

On that date, Mr. Salerno noticed that people had moved into the storefront, but he was unaware of the identity of the occupants. Mr. Salerno reinspected the premises, to determine whether the violations had been corrected. The reinspection revealed that the violations had not been corrected. Mr. Salerno then served a notice to remedy violations on Mr. Spencer and the EFWA, including Mr. Heimbach, on September 17, 1977. After being served with the notice to remedy, Mr. Spencer requested

Mr. Heimbach and the EFWA to vacate the premises. Mr. Heimbach refused (CA-130, 131).

After waiting several days to see whether the premises would be vacated, Mr. Salerno swore out an Information before the Village Justice John Perry, alleging that Mr. Heimbach had violated the State Building Construction Code by occupying the premises at 40 Water Street without fire separations or a certificate of occupancy. Mr. Salerno attached a supporting deposition from Mr. Spencer to the Information. Justice Perry issued an arrest warrant on September 21, 1977, and Mr. Heimbach was arrested and arraigned before Justice Perry on September 22, 1977 (CA-130, 131). Bail was raised and Mr. Heimbach was released after six hours of incarceration (CA-66, 67). Justice Perry, because he was subsequently named as a defendant in this action, transferred the case to Wayne County Court, and the disposition of the case is presently unknown to respondents (CA-142, 144).

Through leaflets handed out by the members of the CCSWS, the respondents then became aware that the petitioners were threatening litigation against the Village (CA-126 and R-45, Exhibit "E"). Mr. Villani, by letter dated October 7, 1977, advised the Board that further discussions between it, the EFWA and petitioners Heimbach and the CCSWS should take place between their respective counsel (CA-126). Petitioners continued to freely picket outside the Board meetings and the County of Wayne Department of Social Services. This action was subsequently commenced by the petitioners on October 19, 1977.

ARGUMENT

POINT I. WOULD A REVIEW BY THIS COURT CONSTITUTE NOTHING MORE THAN A THIRD JUDICIAL EXAMINATION OF THE FACTS OF THIS CASE WHERE THE FINDINGS OF THE COURTS BELOW ARE FAIR AND SUPPORTED BY SUBSTANTIAL EVIDENCE?

Respondents emphasize two points in opposition to petitioners' request that this Court grant certiorari to review the peculiar facts presented in a case which two previous courts have resolved in favor of respondents. The first point is the Supreme Court has held that "The rule is well settled that in such circumstances, where two courts have agreed, we will not enter upon a minute analysis of the evidence." *Boehmer v. Pennsylvania R.R. Co.*, 252 U.S. 496, 498 (1920). Concurrent findings are not to be disturbed unless plainly without support. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938). This Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220 (1925); and see *NLRB v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

Petitioners' main points in requesting that this Court perform a third judicial review of the facts of this case are that the District Court "did not construe the evidence in its most favorable light in favor the party opposing the motion" and that the District Court did not provide any analysis of how respondents showed the absence of a genuine issue of material fact (See petition at pp. 40, 41).

Respondents submit that these assertions are incorrect. The opinion of the District Court was rendered after a thorough and impartial review of the lengthy facts of this case, including petitioners' papers, which the Court reviewed in spite of their untimely and improper submission. District Court Judge Michael

A. Telesca wrote "This Court should not have to sift through the entire record to discern possible causes of action for plaintiffs who are represented by counsel. Nevertheless, the Court must do so when faced with defendants' summary judgment motion." (A-14).

Further, Judge Telesca clearly addressed throughout his opinion the respondents' burden to establish the absence of a genuine issue of material fact in discussing each of petitioners' claims and found that respondents had fully met their burden. Petitioners then appealed to the Second Circuit Court of Appeals, arguing essentially the same points that they have raised in their petition for writ of certiorari to this Court. After another review of the record, Chief Judge Ellsworth A. Van Graafeiland, Judge Thomas J. Meskill and Judge Jon O. Newman affirmed the judgment of the District Court for the reasons set forth in Judge Telesca's opinion (A-23). Under these circumstances, respondents submit that petitioners are asking this Court to make a third scrutiny of a lengthy record to see if yet another judicial review will substantiate petitioners' claims, where the review by two prior courts had not. This is not a proper basis for requesting this Court to grant certiorari.

The second point respondents emphasize is that petitioners did not argue the theory of law of the case in either the District Court or the Court of Appeals, and therefore, this argument is not properly before this Court. However, respondents will address this point because petitioners make a fundamental mistake in arguing this theory with respect to the circumstances of this case which also highlights why the decisions of the lower courts should not be disturbed.

As was discussed in the statement of the case, the late District Court Judge Harold P. Burke had granted respondents' motion and dismissed petitioners' complaint prior to the completion of any discovery on the grounds that respondent, Village of Lyons,

was not a person within the meaning of 42 U.S.C. § 1983, in reliance on the then-binding precedent of *Monroe v. Pape,* 365 U.S. 167 (1961). On appeal, the Second Circuit Court of Appeals reversed and remanded on the authority of *Monell v. Dept. of Soc. Serv. of City of N. Y.,* 436 U.S. 658 (1978), which was decided subsequent to the ruling of Judge Burke. The Court of Appeals remanded this case "for further proceedings so that the plaintiffs below may be given an opportunity to prove their allegations", *Heimbach v. Village of Lyons,* 597 F.2d. 344, 348 (2d Cir. 1979) (A-6). After seven years of discovery, the District Court then granted respondents' motion for summary judgment pursuant to Fed. R. Civ. P. 56 and rendered an opinion which addressed each of petitioners' claims individually and found petitioners had failed to demonstrate any genuine issue of material fact.

In Point I of their argument, petitioners assert that the alleged facts in their complaint should somehow be considered the law of the case on the basis that the Court of Appeals upheld the sufficiency of the complaint in 1978 (See petition at pp. 12, 22, 23). At issue here, however, is not the sufficiency of the complaint but rather the two previous courts' interpretations of the facts presented by both parties with respect to the motion for summary judgment. The alleged facts set forth in the complaint were vigorously disputed by respondents in their motion for summary judgment. Furthermore, respondents fully and properly substantiated the factual averments made in support of their motion. After seven years of discovery, petitioners were unable to rebut respondents' proof that no genuine issue of material fact existed in this case which would prevent summary judgment from being granted. The District Court came to this conclusion after a thorough review of the entire record and the Court of Appeals affirmed.

Therefore, respondents urge that this Court deny certiorari for the reasons set forth in *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951):

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. . .In such situations, we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543, 544.*

POINT II. SHOULD THIS COURT DECLINE TO GRANT A PETITION IN WHICH NO SUBSTANTIAL FEDERAL QUESTION OF IMPORTANCE TO THE PUBLIC WAS RAISED BY PETITIONERS?

Neither the Questions Presented nor the Arguments made by petitioners raise a substantial federal question of sufficient importance to the public to warrant this Court's review. Respondents assert that no federal question was raised because none exists. The facts and circumstances of this case and the application of the law involved simply are not of sufficient consequence to merit certiorari.

The Arguments raised by petitioners turn entirely on the facts of this particular case, and are devoid of significance to anyone outside of this case. Even were this Court to review all the facts in this case and arrive at a different analysis of the evidence than the two previous courts did, such a result would not equal the required public significance so as to merit granting certiorari. Supposing that if, as petitioners seek, a trial were ordered by this Court, the outcome would not even affect all those persons living in the Village of Lyons, much less the general public on a na-

tional scale. The people filling the offices of Mayor, Board of Trustees, and Building Inspector of the Village of Lyons are no longer those persons whom petitioners named in this lawsuit. The persons lawfully evicted from the buildings have found other housing within the Village. Certainly, a monetary award would not affect anyone but the parties. Most importantly, the exact facts of the present case are unlikely to recur in either the Village of Lyons or any other municipality and are too narrow to warrant review by this Court on certiorari.

This Court has made it clear that in the exercise of its discretionary power of review upon writ of certiorari, it does not sit for the benefit of particular litigants. *Magnum Import Co. v. Coty,* 262 U.S. 159 (1923). The case must have "special and important reasons" which reach to a problem beyond the academic or the episodic. *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955). Finally, however important the case may be to the petitioner, writ of certiorari will not be granted except in cases involving principles, the settlement of which is of gravity and importance to the public as distinguished from the parties. *Fields v. United States,* 205 U.S. 292 (1907); see also *Layne & Bowler Corp. v. Wester Well Works, Inc.,* 261 U.S. 387 (1923). Therefore, respondents urge that the writ of certiorari be denied in this case.

POINT III: DOES THE SECOND CIRCUIT COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S OPINION REPRESENT A CONFLICT OF AUTHORITY WITH OTHER COURTS OF APPEAL REQUIRING SETTLEMENT BY THIS COURT?

In the second of the Questions Presented by petitioners, they allege that the Second Circuit Court of Appeals' affirmance of the District Court's opinion constitutes a conflict of authority with other Courts of Appeals which requires settlement by this Court. However, the only mention of this proposition in their ar-

gument is found in Footnote "22", which states that the Circuit Courts agree with the fundamental proposition that a District Court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought (See petition at pp. 41, 52). None of the cases cited by the plaintiff in Footnote "22" are factually on point, however, respondents submit that a reading of each clearly demonstrates that the Second Circuit Court of Appeals is entirely in agreement with the judicial summary judgment standard of review set forth in those cases. In fact, the Second Circuit Court of Appeals' affirmance of the District Court's opinion is very much in harmony with the other Courts of Appeals and any allegation by petitioners of a conflict is merely illusory.

Factually, not one of the cases cited by petitioners involve a conspiracy to deprive persons from exercising their First Amendment rights. *Kim v. Coppin State College,* 662 F.2d 1055 (4th Cir. 1981) involves a discrimination in compensation suit where the District Court entered a directed verdict against plaintiffs. *Alvey v. United Air Lines, Inc.,* 494 F.2d 1031 (D.C. Cir. 1974) is a defamation and false imprisonment suit. *Ramirez v. National Distillers and Chem. Corp.,* 586 F.2d 1315 (9th Cir. 1978) is an employment discrimination lawsuit. *Dreher v. Sielaff,* 636 F.2d 1141 (7th Cir. 1980) is an attorney access case. *Bolack v. Underwood,* 340 F.2d 816 (10th Cir. 1965) is an action to quiet title. And finally, *Experimental Engineering Inc. v. United Technologies Corp.,* 614 F.2d 1244 (9th Cir. 1980) is a breach of contract case where defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. The fundamental standards of law and summary judgment review set forth by these Circuit Courts are in unity with the Second Court of Appeals' affirmance of the District Court's opinion in the case at bar.

Where there is no conflict between the decisions of State and federal courts or between those of federal courts of different circuits, certiorari should not be granted. *Fields v. United States,* 205 U.S. 292 (1907). Where it appears that the asserted conflict and decisions arise from differences in states of fact, and not in the application of a principal of law, the writ of certiorari should be dismissed as improvidently granted. *Wisconsin Electric Co. v. Dumore Co.,* 282 U.S. 813 (1931). Certiorari should be granted only where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955). Therefore, it is submitted that no conflict of authority exists between the order of the Second Circuit Court of Appeals in this case and the decisions concerning summary judgment standard of review by the other Circuit Courts of Appeals and certiorari in this case should be denied.

Respectfully Submitted,

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APPENDIX

In The

United States Court of Appeals

For the Second Circuit

No. 610 — August Term, 1978.

(Submitted January 19, 1979 Decided April 26, 1979.)

Docket No. 78-7467

MARK HEIMBACH, individually and as Acting President of CITIZENS COMMITTEE TO SAVE WATER STREET,

Plaintiff-Appellant.

vs.

VILLAGE OF LYONS (WAYNE COUNTY, NEW YORK), et al.,

Defendants-Appellees.

Before:

WATERMAN, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York (Burke, J.) dismissing this suit for damages and declaratory and injunctive relief brought under 42 U.S.C. §§ 1983 and 1985.

Dismissal order affirmed as to the action for damages against the village justice; as to all other defendants-appellees, reversed and remanded for further proceedings below.

MARK HEIMBACH, Lyons, New York, Appellant, pro se.

JOSEPH V. McCARTHY, Brown, Maloney, Gallup, Roach & Busteed, P.C., Buffalo, New York, for Defendants-Appellees.

PER CURIAM:

The plaintiff-appellant, Mark Heimbach, individually and as Acting President of Citizens Committee to Save Water Street, appeals from a judgment of the United States District Court for the Western District of New York (Burke, J.) dismissing this suit brought under 42 U.S.C. § 1983 and 1985. The plaintiffs below are allegedly residents of the Village of Lyons and members of organization called the "Eastern Farm Workers Association" (hereinafter "EFWA") and "Citizens Committee to Save Water Street" (hereinafter "CCSWS"). The defendants-appellees are the Village of Lyons, members of its present and past board of trustees, the village Justice of the Peace, the village Chief of Police, the village Building Inspector, and certain fictitious defendants. We affirm the dismissal order as to the action for damages against Justice John Perry; as to all other defendants-appellees, we reserve and remand for further proceedings below.

The complaint alleged that the defendants acted in concert under color of state law so as to prevent, and that they, through a series of harassments and illegal evictions and arrests, effectively did prevent, the plaintiffs from exercising their first amendment

rights to freedom of speech, to petition the government for the redress of grievances, and to peaceful assembly. More specifically, the plaintiffs alleged that efforts have been illegally made by the defendants to evict low-income people from their homes and buildings on Water Street in the Village of Lyons, so that the Lyons Village Government could redevelop the area for business and commercial interests. In furtherance of that goal, they alleged that the defendants harassed and illegally evicted the EFWA and CCSWS from premises on Water Street in the Village of Lyons. They alleged further that the defendants harassed and illegally arrested Mark Heimbach, the operations manager of the EFWA and the Acting President of the CCSWS, for a supposed misdemeanor pursuant to a section of the State Building Construction Code which has no provision for criminal penalties, and, in particular, has no penalties applicable to a tenant such as appellant Heimbach. The plaintiffs sought damages and declaratory and injunctive relief.

In dismissing the suit against the Village of Lyons, Judge Burke correctly relied upon the then binding precedents of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), and *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), and ruled that the "Village of Lyons is not a person within the meaning of 42 U.S.C. 1983." However, subsequent to the ruling of Judge Burke, the U.S. Supreme Court decision in *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018 (decided June 6, 1978), overturned those precedents and held that the legislative history of the Civil Rights Act makes it clear that a municipality is indeed a "person" under § 1983. As the appellant alleges actions implementing an official policy of harassment and encroachment upon first amendment rights, he states a claim for damages and injunctive relief against the village. *Monell, supra*, 98 S.Ct. at 2036. *Cf. Turpin v. Mailet*, 579 F.2d 152, 164 (2d Cir. 1978), *vacated and remanded in light of Monell sub nom. West Haven v. Turpin*, 47 U.S.L.W. 3368 (U.S.

Nov. 27, 1978) (damage action maintainable where actions "authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level.")

Judge Burke further ruled that the individual defendants are immune from suit. In so ruling, the district court judge was correct as to the suit for damages against the Village Justice Court Judge, John Perry, inasmuch as Justice Perry, by signing a criminal arrest warrant against appellant Heimbach, was not acting "in the 'clear absence of all jurisdiction.' [Bradley v. Fisher], 13 Wall. [80 U.S. 335, 20 L.Ed. 646 (1872)], at 351." *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105 (1978). Justice Perry does have jurisdiction over criminal matters under New York State law, C.P.L. § 120.20(1). As the Court stated in Bradley v. Fisher, supra, 80 U.S. (13 Wall.) at 352:

> (I)f . . . a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for this judicial consideration, whenever his general jurisdiction over the subject-matter is invoked.

Thus, while Justice Perry may have acted maliciously in signing a criminal arrest warrant against appellant Heimbach, as appellant maintains, the justice is nonetheless immune from suit for damages for his actions. The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action. *See Allee v. Medrano*, 416 U.S. 802, 819-20, 94 S.Ct. 2191, 2202, 40 L.Ed.2d 566 (1974); *Person v. Association of Bar of City of New York*, 554 F.2d 534, 537 (2d Cir.), *cert. denied*, 434 U.S. 924 (1977); *Littleton v. Berbling*, 468 F.2d 389, 395-414 (7th Cir. 1972) *rev'd on other grounds sub nom.*

O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972); *Boddie v. State of Connecticut*, 286 F.Supp. 968, 971 (D. Conn. 1968), *rev'd on other grounds but aff'd sub silentio on limitation on judicial immunity*, 401 U.S. 371, 91 S.Ct. 780 (1971). Moreover, inasmuch as appellant Heimbach alleged a pattern of harassment and alleged that a criminal prosecution was initiated against him in bad faith without hope of conviction and which resulted in a chill upon the exercise of his first amendment rights, his allegations are sufficient to remove any bar to injunctive interference with state court criminal prosecutions. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971); *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

The other village officials do not share Justice Perry's absolute immunity from suit for damages; rather, they are entitled merely to a qualified good faith immunity. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967).

Plaintiffs here have alleged bad faith and improper and discriminatory motives on the part of the police officers who served a facially invalid warrant upon appellant Heimbach. Hence, those cases relied upon by the appellees dealing with "the defenses of good faith purpose and reasonable grounds," *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975), are inapposite and do not warrant the dismissal of this action against the officers. See *Pierson v. Ray, supra; Tucker v. Maher*, 497 F.2d 1309, 1313 (2d Cir. 1974); *Ellenburg v. Shepherd*, 304 F. Supp. 1059, 1061-62 (E.D. Tenn. 1966), *aff'd*, 406 F.2d 1331 (6th Cir. 1968), *cert. denied*, 393 U.S. 1087, 89 S.Ct. 878 (1969). *See also Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 616 (1871); *Guzman v. West-*

ern State Bank of Devils Lake, 540 F.2d 948, 951-52 (8th Cir. 1976).

Similarly, plaintiffs' allegations of bad faith in the administration of the State Building Construction Code and the zoning ordinances preclude dismissal of the actions against the other village officials on the grounds of a qualified immunity. Accepting the allegations in the complaint as true, as we must in our review of the district court's dismissal, the village officials acted neither with a good faith belief in the lawfulness of the actions taken nor with reasonable grounds so to believe. Thus, dismissal of the suit against the village officials below was erroneous. *Scheuer v. Rhodes, supra*, 416 U.S. at 247-48, 94 S.Ct. at 1692; *Wood v. Strickland, supra*, 420 U.S. at 322, 95 S.Ct. at 1001; *Laverne v. Corning*, 522 F.2d 1144, 1150 (2d Cir. 1975).

Accordingly, we affirm the dismissal of the damage claims against Village Justice Perry but reverse the remainder of the judgment of the district court and remand for further proceedings so that plaintiffs below may be given an opportunity to prove their allegations.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARK HEIMBACH, Individually and as Acting President of CITIZENS COMMITTEE TO SAVE WATER STREET, et al

Plaintiffs

—vs—

VILLAGE OF LYONS, et al

Defendants

DECISION and ORDER

Civ. 77-562T

This action, one of the oldest on the Court's docket, was brought in 1977 under 42 U.S.C. §§ 1983 and 1985 seeking redress for alleged constitutional violations committed by defendants in their efforts to upgrade a section of the Village of Lyons known as the Water Street area. Pending before me is defendants' motion for summary judgment and for attorneys fees. Also pending is plaintiff's cross-motion for summary judgment and attorneys fees, which, as will be set forth fully below, was not timely filed. For the reasons set forth below, defendants' motion for summary judgment is granted in all respects but one, and their motion for attorneys fees is denied. Plaintiffs' cross-motion for summary judgment and attorneys fees is denied.

FACTS

In 1976 and 1977 defendant Village of Lyons submitted applications through the Wayne County Planning Board for federal assistance under the Community Development Block Grant (CDBG) program. In conjunction with these applications, the

Village Board of Trustees hired the architectural firm of Sherman and Sherman from Newark, New York to study and evaluate the historic buildings located in the Water and Broad Street area in the Village. The Sherman and Sherman architect who inspected the buildings was accompanied by the Village Building Inspector, defendant Louis A. Salerno, who took notes on apparent violations of State and local building codes. Sherman and Sherman presented its report to the Village Board of Trustees and to landlords from the Water and Broad Street area, at a public meeting on May 24, 1977.

In approximately July of 1977, defendant Salerno issued notices to remedy violations to various landlords of buildings which were out of compliance. One of the landlords served with a notice was a Travis Spencer, owner of a storefront later rented by plaintiff Citizens Committee to Save Water Street. On August 16, 1977, plaintiff Mark Heimbach and a group with which he was affiliated, the Eastern Farmworkers Association, began picketing outside the Village Board meetings to protest the building code enforcement program, which they felt was directed at removing poor and minority persons from the Broad and Water Street areas. The next day defendant Salerno inspected the premises they were then renting at 18 Geneva Street and the group's then-landlord (Mr. Valcho "Vic" Pikoff) notified them that they would have to vacate. Mr. Salerno states that his inspection was done at the landlord's request (because the landlord had recently completed some repairs and wanted to see if they met code standards), and that he (Mr. Salerno) did not know that Eastern Farmworkers (or anyone else) was renting the building at that time.

During that summer, plaintiff Heimbach and others formed the Citizens Committee to Save Water Street to "expose [the] defrauding of our people" by the Village in its alleged misuse of federal and State redevelopment funds to destroy the economic

viability and vitality of the community. After hearing the group's concerns at public Board meetings and at least two private informal meetings, Mayor Fabino notified the Department of Housing and Urban Development (HUD) on September 2, 1977 that the Village was concerned about the relocation of any residents in the affected area. On September 12, 1977 Village Attorney Anthony J. Villani wrote to the Board of Trustees that the Board was "free to utilize the [C]itizens [C]ommittee as an advisory group," but that the Citizens Committee could not have any actual decision-making power for the Village.

On September 10, 1977 the Eastern Farmworkers Association entered into a lease with Travis Spencer for the premises at 40 Water Street, Lyons, New York. The lease term was to begin October 1, 1977. Apparently, as of September 10, the defects noted in Mr. Spencer's July 6, 1977 Notice to Remedy Violation (inadequate fire separations, egress, light, and ventilation, and loose bricks) had not been entirely corrected. It appears that Mr. Spencer intended to correct these deficiencies before October 1; nevertheless, on or about September 12, the Eastern Farmworkers Association occupied the premises. Plaintiff Heimbach contends that the Eastern Farmworkers' Association moved in with Mr. Spencer's permission, and that Mr. Spencer had given them a key. Mr. Spencer, however, subsequently provided Building Inspector Salerno with a written statement which makes it appear that he first learned about the premises being occupied from defendant Salerno.

On September 17, 1977, defendant Salerno served a Notice to Remedy Violation on the Eastern Farmworkers Association as tenant of 40 Water Street. The Notice stated that the Farmworkers Association was in violation of the State Building Construction Code and local zoning ordinances because it was occupying the premises without a Certificate of Occupancy, and ordered the Farmworkers Association to remedy the conditions

at once. By all accounts, plaintiff Heimbach refused to vacate the premises. After waiting several days to see whether the premises would be vacated, Building Inspector Salerno swore out an Information before Justice Court Judge John Perry (a defendant in this action), alleging that plaintiff Heimbach had violated the State Building Construction Code on September 21, 1977 by occupying the premises at 40 Water Street without fire separations or a Certificate of Occupancy. Attached to his Information was the statement from Travis Spencer which made it appear that Mr. Heimbach did not have his permission to move in, and that he (Mr. Spencer) had not had an opportunity to install the fire separations and obtain a Certificate of Occupancy. Justice Perry issued an arrest warrant for plaintiff Heimbach on September 21, and on September 22, plaintiff Heimbach was arrested and arraigned before Justice Perry. A few hours later, bail was raised and plaintiff Heimbach was released. The case has never been prosecuted further; because he was a defendant in this case, Justice Perry transferred the case to Wayne County Court, where it remains to this day.

Through leaflets handed out by the Citizens Committee, the Village Board then became aware that plaintiffs were threatening litigation. On October 7, 1977, Village Attorney Villani advised the Village that further discussions between it and plaintiff Heimbach or the Eastern Farmworkers Association should take place between their respective counsel. Defendant Fabino resigned from the office of Mayor for personal reasons on September 21, 1977, and was succeeded by the late John C. Dashney, also a defendant in this action.

On October 19, 1977, the complaint in this action was filed, along with a request for a temporary restraining order. On October 21, 1977, my predecessor Judge Harold P. Burke issued an order temporarily restraining defendants from: arresting any plaintiffs for being present at 40 Water Street, or for alleged vio-

lations of the New York State Building Construction Code or any related provisions of the Village Municipal Code; issuing any arrest warrant or other civil or criminal process which would have the same effect, or which would abridge or threaten the First Amendment rights of plaintiffs, or continuing with the criminal proceeding against Mark Heimbach.

Later, in response to a motion by defendants, Judge Burke on February 17, 1978 dismissed the action against all defendants on the basis of the Supreme Court's holding in *Monroe v. Pape,* 365 U.S. 167 (1961). Subsequent to Judge Burke's decision, the Supreme Court reversed *Monroe v. Pape* in *Monell v. Department of Social Services,* 436 U.S. 658 (1978). On the basis of *Monell,* the Second Circuit reversed Judge Burke, in a decision reported at 597 F.2d 344 (1979). The Second Circuit dismissed the claim for damages against Justice Perry, on the ground of judicial immunity. The case now comes before me, after three changes of attorneys by plaintiffs and seven more years of discovery, on the motion by the remaining defendants for summary judgment, and on plaintiffs' late-filed cross-motion for summary judgment.

DISCUSSION

I.

Defendants' motion for summary judgment was filed on December 19, 1985 and was originally returnable December 31, 1985. Because that date was not a motion day for the Court, the return date was adjourned, and because plaintiffs requested additional time to submit their answering papers, the adjourned date was set as January 22, 1986. Under the Local Rules of Practice of the United States District Court for the Western District of New York, plaintiffs' papers should have been served and filed three days prior to the return date. Local Rule 14(C). Under Fed. R. Civ. P. 6(a), in computing any period of time prescribed or allowed by the local rules of any district court, when the period of

time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. Under these Rules, plaintiffs' answering papers and memoranda should have been served and filed by January 16, 1986. In addition, the Guidelines for Practice and Procedure before this Court, Section V(C), require that opposing papers for a motion be filed and served three *business* days prior to the return date of the motion, which would likewise have been January 16, 1986.

Plaintiffs' answering papers were filed with the Court five days late, on January 21, 1986, the day before the return date. Accordingly, this Court is justified in declining to consider the opposition papers on the ground that they were untimely filed, and in treating defendants' summary judgment motion as unopposed. *Davidson v. Keenan,* 740 F.2d 129, 132 (2d Cir. 1984). Plaintiffs made no attempt to communicate to this Court that the papers would be untimely filed, nor did they seek an extension of time to file their papers. The only excuse offered by plaintiffs' counsel at oral argument was that January 20th was a Federal holiday; in light of Fed. R. Civ. P. 6(a)'s specific exclusion of Martin Luther King Jr.'s birthday from the computation of time, that is no excuse at all.

II.

Even if plaintiff's papers had been timely submitted, they would have been defective for another procedural reason. Fed. R. Civ. P. 56(e) requires that supporting and opposing affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Time and time again, the Second Circuit has held that an attorney's affidavit which is not based on first-hand knowledge is not entitled to any weight, and is insufficient to oppose a summary judgment motion. *Chandler v. Coughlin,* 763 F.2d 110, 113-14 (2d Cir. 1985);

Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983); *United States v. Bosurgi,* 530 F.2d 1105, 1111 (2d Cir. 1976). Nor is an attorney's statement of disputed facts a substitute for an affidavit based on personal knowledge. *Zanghi v. Incorporated Village of Old Brookville,* 752 F.2d 42, 47 (2d Cir. 1985); *L & L Started Pullets, Inc. v. Gourdine,* 762 F.2d 1, 3-4 (2d Cir. 1985). Even in cases involving alleged discriminatory intent, in which summary judgment is generally not appropriate, a plaintiff must still come forward with evidence meeting the requirements of Rule 56(e), to withstand a summary judgment motion by defendants. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 160-61 (1970); *Gatling v. Atlantic Richfield Co.,* 577 F.2d 185, 188 (2d Cir. 1978), *cert. denied,* 439 U.S. 861 (1978); *see also, Markowitz v. Republic National Bank of New York,* 651 F.2d 825, 828 (2d Cir. 1981).

Plaintiffs in this case submitted only a three page attorney's affirmation in response to the motion. Along with the affirmation, a memorandum of law was submitted containing a long list of allegedly uncontroverted facts in support of plaintiffs' cross-motion for summary judgment, and also containing voluminous exhibits. Similar submissions have been held to be insufficient to support the granting of summary judgment, and to be of "no more use" in opposing a grant of summary judgment. *Schiess-Froriep Corp. v. S.S. Finnsailor,* 574 F.2d 123, 126-27 (2d Cir. 1978).

Accordingly, even if plaintiffs' papers had been timely submitted, they would be insufficient to oppose an award of summary judgment to defendants.

III.

Nevertheless, even though plaintiffs have not submitted evidentiary matter to establish that there is indeed a genuine issue for trial, defendants must still establish the absence of a genuine issue concerning any material fact, if they are to prevail on their

summary judgment motion. *Zanghi v. Incorporated Village of Old Brookville, supra,* 752 F.2d at 47; 6 J. Moore, Moore's Federal Practice, ¶ 56.22(2), p. 56-1344 and ¶ 56.23, pp. 56-1389-1390 (2d Ed. 1985). Defendants have done so in this case.

It is difficult to decipher exactly what plaintiffs in this case have alleged. They have presented the Court with an undifferentiated collection of facts, and ask the Court to find that these facts establish a conspiracy by defendants to violate various Constitutional rights of plaintiffs, specifically First Amendment, Due Process, and Equal Protection rights. This Court should not have to sift through the entire record to discern possible causes of action for plaintiffs who are represented by counsel. Nevertheless, the Court must do so when faced with defendants' summary judgment motion.

A.

The plaintiffs attempt to tie their various constitutional claims together under the umbrella of an alleged conspiracy by defendants to violate these rights. According to plaintiffs, the Village was attempting to drive out poor and minority residents through its use of the CDBG money and strict code enforcement. Defendants have controverted this argument in affidavits supplied by defendants Fabino, Lese and Salerno that there was no conspiracy, and that they were acting in good faith to improve the Water Street area (without necessarily driving out poor or minority residents) when they committed the acts complained of.

> Where a plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment. Something more than a fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact.
>
> * * *

> Courts must be particularly cautious to protect public officials from protracted litigation involving specious claims.

Contemporary Mission, Inc. v. U.S. Postal Service, 648 F.2d 97, 107 (2d Cir. 1981). *See also, Sommer v. Dixon,* 709 F.2d 173, 174-75 (2d Cir. 1983), *cert. denied,* 464 U.S. 857 (1983); *Batista v. Rodriguez,* 702 F.2d 393, 397 (2d Cir. 1983); and *Koch v. Yunich,* 533 F.2d 80, 85 (2d Cir. 1976) (in pleadings alleging conspiracy, facts forming the basis for the conspiracy must be averred with particularity).

The record contains nothing more than plaintiff Heimbach's conclusions that defendants were conspiring to violate his civil rights. He states in his deposition that defendants were pressuring his landlords to evict him because of his organizations' political activities (Deposition Transcript pgs. 11-21, 51, 62-64, 73-77, 83-85, 88-89). Defendant Salerno refutes these allegations in his deposition and his affidavit submitted with defendants' summary judgment motion. He states that Heimbach's first landlord, Mr. Pikoff, approached him to do an inspection of the premises occupied by the Eastern Farmworkers Association, because he (Mr. Piloff) [sic] had recently completed repairs and wanted to ensure that the building was now in compliance. Mr. Salerno states further that the notice of violation served upon Heimbach's second landlord, Mr. Spencer, was served in July, well before Mr. Spencer even met plaintiff Heimbach, and that enforcement action was taken when plaintiff Heimbach occupied the premises because Mr. Spencer had previously agreed not to rent out the premises until the violations were corrected and a certificate of occupancy was obtained.

As set forth above, plaintiffs have failed to submit timely or sufficient opposing papers to the motion. In addition, despite seven years' opportunity for discovery, the record contains nothing (such as an affidavit or deposition transcript from Mr. Pikoff

or Mr. Spencer) which would support plaintiff Heimbach's conclusions that they were being pressured because his organizations were their tenants.

Similarly, plaintiff Heimbach in his deposition refers to evictions of a Mr. Rodriguez (Transcript at 47), and an elderly amputee (Transcript at 72-73). Yet these evictions were not carried out by the Village, but by particular landlords who chose not to bring their buildings up to code standards. No affidavits from the landlords, the tenants, or any other individuals are submitted to support plaintiff Heimbach's conclusion that these or any other evictions were illegal, or were somehow part of a conspiracy directed against the Citizens Committee. Likewise, plaintiff Heimbach relates conversations he had with defendant Peter Stirpe, a Village Board member who allegedly told plaintiff Heimbach that the Village Board, defendant Salerno, and the Village Attorney were pushing the evictions (Transcript at 54-55). Evidently, no attempt was made to depose Mr. Stirpe, and defendants Salerno and Fabino have denied the allegation.

Other than plaintiff Heimbach's conclusions during his deposition, there are simply no facts in the record to support plaintiffs' allegations that defendants conspired to violate their civil rights. His unsupported conjectures are not enough to withstand a summary judgment motion. *See Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985); *Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir. 1978); *cert. denied,* 439 U.S. 861 (1978). Defendants have met their burden of showing that no material issue of fact remains as to this question.

B.

According to plaintiffs' Memorandum of Points and Authorities, the gravamen of plaintiffs' complaint is that defendants attempted to and did infringe plaintiffs' First Amendment rights to freedom of speech, petition, and peaceful assembly. Defendants

code enforcement program and arrest of Mark Heimbach, it is alleged, were in retaliation for plaintiffs' picketing and advocating the rights of minorities and poor people. Defendant Salerno's affidavit, and the affidavits and deposition transcripts of the other defendants, vigorously controvert this assertion, and point out that at no time did any defendant interfere with the picketing of the Village Board meetings.

On their face, the code enforcement program and the arrest of plaintiff Heimbach for a code-related misdemeanor are not directed at speech. Thus, these actions do not violate the First Amendment if they further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. Albertini*, 105 S.Ct. 2897, 2906 (1985), quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968). It is beyond question that the building code enforcement program furthers an important or substantial governmental interest of protecting the public from unsafe buildings. *Burtnieks v. City of New York*, 716 F.2d 982, 987 (2d Cir. 1983); *see also, English v. Town of Huntington*, 448 F.2d 319, 323 (2d Cir. 1971).

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed making living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Berman v Parker, 348 U.S. 26, 32-33 (1954). Secondly, the plaintiffs do not attempt to argue that this governmental interest itself is somehow related to the suppression of free expression. Finally,

plaintiffs do not argue that the enforcement of building codes intrinsically results in an incidental restriction on alleged First Amendment freedoms that is somehow greater than is essential to the furtherance of an interest. (Plaintiffs' argument that the building codes were being selectively applied to them because of their expression of their political views will be addressed below.)

Accordingly, defendants have met their burden of demonstrating that no material issue of fact exists, and that they are entitled to summary judgment as to plaintiffs' claim that defendants violated their First Amendment rights.

C.

Plaintiffs in their complaint also allege that the building codes have been selectively enforced against them and their landlords, not only because they represent the interests of minorities and poor persons, but also because of their picketing and other activities protected by the First Amendment. Presumably this argument is premised on the rationale underlying *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), and subsequent cases, that a law which o its face is constitutional can become unconstitutional under the Equal Protection Clause of the Fourteenth Amendment if those in charge of administering it enforce it selectively. *See English v. Town of Huntington,* 448 F.2d 319, 323 (2d Cir. 1971).

To qualify for "strict scrutiny" under the Equal Protection Clause, plaintiffs must show both proof that a racially discriminatory purpose has been a motivating factor in official action, and proof that the official action results in a racially disproportionate impact. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-266 (1977). Beyond their conclusory allegations, plaintiffs have introduced absolutely no proof of either. They have introduced no clear pattern, unexplainable on grounds other than race, as in the *Yick*

Wo case. They have introduced no statistical evidence of the type introduced in *Washington v. Davis,* 426 U.S. 229 (1976), that the burden of the code enforcement program fell disproportionately upon minorities. *See also Jefferson v. Hackney,* 406 U.S. 535 (1972). They have introduced no proof of a racially discriminatory motive, and there are simply no facts from which a court can infer a prejudiced motive, on the part of the defendants. Accordingly, plaintiffs are not entitled to strict scrutiny under the Equal Protection Clause because they represent minority interests.

Nor are plaintiffs entitled to strict scrutiny because they represent the interests of poor persons. Discrimination on the basis of wealth has never by itself provided an adequate basis for invoking strict scrutiny under the Equal Protection Clause. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28-29 (1973).

Because no suspect class has been implicated, plaintiffs' claim of selective enforcement, even though it is arguably based on the exercise of plaintiffs' First Amendment rights, must be judged under ordinary equal protection standards. *Wayte v. United States,* 105 S.Ct. 1524, 1531 (1985). These standards require plaintiffs to show both that the enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. *Id.* Very simply, throughout the record, plaintiffs have shown neither, whether based on race (as set forth above), poverty, First Amendment expression or any other classification. There is no indication that the code enforcement program was directed at anything other than improving the conditions of the buildings in the Water and Broad Street area, and was applied without regard to race, income, or political views.

Accordingly, there being no issue of material fact, defendants have met their burden on this issue under Rule 56.

D.

Plaintiffs also allege in their complaint that defendants' action denied them due process. The Court will treat separately plaintiffs' allegations concerning code enforcement generally, and plaintiffs' allegations concerning defendants' actions against Mark Heimbach in particular.

With respect to the code enforcement in general, plaintiffs point to a decision by the late New York State Supreme Court Justice Robert P. Kennedy in *Matter of Crisci v. Dashney,* Index No. 15574 (S.Ct. Wayne County, June 1, 1978), in which Justice Kennedy set aside a code enforcement proceeding against Mr. Crisci, a landlord, on the ground that the Village had not complied with the procedures set forth in its own code. Mr. Crisci is not a party to this action, however, nor have plaintiffs bothered to allege whether or not they (or any of their members) are property owners who have been served with a notice to remedy and then denied due process by the defendants (other than plaintiff Heimbach's interest as a tenant, which will be addressed below). This presents obvious standing problems, *Warth v. Seldin,* 422 U.S. 490 (1975); *Sierra Club v. SCM Corp.,* 747 F.2d 99 (2d Cir. 1984), which the parties have not briefed. More importantly, however, it is a failure of proof by plaintiffs on the question whether they even have a property interest subject to protection under the Due Process Clause. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Yale Auto Parts, Inc. v. Johnson,* 758 F.2d 54, 58-59 (2d Cir. 1985). There being no evidence that plaintiffs were deprived of any property interest without due process by the Village's code enforcement program generally, defendants are entitled to summary judgment on this issue.

Plaintiff Heimbach also claims that he was personally denied due process when he was jailed for building code violations, even though he was only a tenant. He points to New York Multiple

Residence Law § 306, which requires both a hearing and notice of right to hearing for one charged with building code violations.

Defendants counter that plaintiff Heimbach had no right to a hearing because he was arrested for failing to vacate a building for which no certificate of occupancy had been issued. This, defendants argue, constitutes a violation of the New York State Building Construction Code § 385, and thus a "disorderly conduct" violation of Village of Lyons Municipal Code § 17.100 and § 20.2006, subd. 3 of the N.Y. Village Law, not just a building code violation.

At this point, I can see no Constitutional violation in plaintiff Heimbach's arrest. On it face the warrant appears to have been properly issued by Justice Perry (who, as the Second Circuit noted, is entitled to immunity from plaintiffs' damage claim). It no longer appears, as alleged in the complaint, that the prosecution was initiated in bad faith, without hope of conviction, to chill the exercise of Mr. Heimbach's First Amendment rights. *Heimbach v. Village of Lyons,* 597 F.2d 344, 347 (2d Cir. 1979)[1] Should the State court determination of pertinent state law present the federal Constitutional issue in a different posture, plaintiff Heimbach is free to commence a separate action alleging a Constitutional violation.

IV.

Along with their motion for summary judgment, defendants have argued that they are entitled to an award of attorneys fees under 42 U.S.C. § 1988, as the prevailing party in this action. Defendants are entitled to attorneys fees only if plaintiffs' action

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[1] I note that neither party has argued since the Second Circuit's 1979 decision that I should abstain from making a determination on the constitutional claim under *Younger vs. Harris,* 401 U.S. 37 (1971), or *Samuels vs. Mackell,* 401 U.S. 66 (1971).

was frivolous, unreasonable, or without foundation, or if plaintiffs continue to litigate after it clearly became so. *Bonar v. Ambach,* 771 F.2d 14, 20 (2d Cir. 1985). Although plaintiffs were unable to prove the conspiracy they alleged, I cannot say that their action was frivolous, unreasonable, or without foundation so as to justify the imposition of attorneys fees. Obviously the allegations were at least serious enough to warrant the Second Circuit's 1979 reversal of Judge Burke's dismissal of the case.

Plaintiffs' request for attorney fees contained in their cross-motion is denied, as plaintiffs were not the prevailing party in this action.

CONCLUSION

Accordingly, for the reasons set forth above, summary judgment is granted to defendants as to all of the claims for relief set forth in plaintiffs' complaint, except for plaintiff Mark Heimbach's claim that his due process rights were violated when he was arrested on September 22, 1977. That claim is dismissed without prejudice.

Plaintiffs' cross-motion for summary judgment is denied, along with their request for attorneys fees.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
February 10, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 23rd day of September, one thousand nine hundred and eighty-six.

P r e s e n t: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,

Circuit Judges.

MARK HEIMBACK, Individually and as acting President of CITIZENS COMMITTEE TO SAVE WATER STREET, et al *Plaintiffs-Appellants,* v. VILLAGE OF LYONS, et al *Defendants-Appellees.*	Docket No. 86-7207

This is an appeal from a judgment of the United States District Court for the Western District of New York, Telesca, *J.*, granting summary judgment against all plaintiffs with respect to their allegation of concerted action to deprive them of civil rights in violation of 42 U.S.C. § 1983 (1982), their First Amendment claims and their selective prosecution in violation of the equal protection claims. Judge Telesca also granted summary judgment against all plaintiffs except plaintiff Heimbach with respect to

their due process claims and dismissed Heimbach's due process claim without prejudice.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED substantially for the reasons spelled out in Judge Telesca's opinion below dated February 10, 1987.

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

ELLSWORTH THOMAS J. MESKILL, U.S.C.J.

JON O. NEWMAN, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.